

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE
SUBSTANTIAL DEVELOPMENT PERMIT
ISSUED TO KENNETH BOWE BY THE
CITY OF WESTPORT,

GRACE LUNDSTAD and BERYL
WHITTLE,

Appellants,

v.

CITY OF WESTPORT and
KENNETH BOWE,

Respondents.

SHB No. 82-2

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal of a shoreline substantial development permit issued by the City of Westport, came on for hearing before the Shorelines Hearings Board, Nat W. Washington, Chairman, Gayle Rothrock, Richard A. O'Neal, and Ronald Holtcamp, Members, convened at Lacey, Washington, on February 23, 1982.

Administrative Law Judge William A. Harrison presided.

Appellants appeared by their attorney Anne Bradley. Respondent

1 City of Westport appeared by William E. Morgan, City Attorney.
2 Respondent Kenneth Bowe appeared by his attorney Robert E. Ratcliff.
3 Reporter Betty Koharski recorded the proceedings.

4 Witnesses were sworn and testified. Exhibits were examined. From
5 testimony heard and exhibits examined, the Shorelines Hearings Board
6 makes these

7 FINDINGS OF FACT

8 I

9 This matter arises in the City of Westport on the shore of Grays
10 Harbor. That shore includes vast areas of salt water marsh which is
11 subject to the tidal action of the Harbor. During the 1930's an
12 earthen dike was constructed which forms the line of extreme high
13 tide. The line of mean, or average, high tide is located further
14 toward the water. Between these lines, on a developed city street,
15 respondent Ken Bowe (Bowe) purchased a 200' x 200' site in 1978 and
16 1979. The area is residential in character. Appellants' homes are
17 across the street from Bowe and are situated on top of the dike.
18 Other homes are located on both sides of the street going back into
19 the city. Bowe proposes to construct a single-family home for his own
20 use on his site.

21 II

22 Between 1965 and 1970, Bowe's predecessor placed shallow fill over
23 an area of approximately 60' x 75' on the site. Another predecessor,
24 in 1978, placed shallow fill over an area approximately 90' x 100'.
25 Bowe believed that neither of these fills were sufficiently deep to

1 create a site suitable for construction. Consequently, he applied to
2 the City for a shoreline substantial development permit in December,
3 1979, to increase the fill. Bowe was told by the City to "go ahead"
4 with filling. He connected the prior fills, increased the fill depth,
5 and squared the contours of his fill leaving a filled area of
6 approximately 81' x 130' which he believes suitable for construction.
7 The volume of all fill placed by Bowe or his predecessors is
8 approximately 2,100 cubic yards. The fill consists primarily of sand
9 and was brought to the site from elsewhere. The City approved Bowe's
10 substantial development permit which was vacated by this Board on
11 appeal and the matter remanded. Whittle v. Westport and Bowe, SHB
12 No. 81-10 (1981).

13 III

14 On September 28, 1981, Bowe applied again for a shoreline
15 substantial development permit to "Build home and retain fill placed
16 on the property by applicant without permit, and to add 30 yards of
17 fill for a driveway into residence." This application was reviewed by
18 the City's Shoreline Management Administrator who ultimately approved
19 it. The substantial development permit was issued to Bowe on
20 December 11, 1981, from which appellants bring this request for review.

21 IV

22 In the course of review by the City's Shoreline Management
23 Administrator, the following events occurred which appellants focus
24 upon.

- 25 1. Application for substantial development permit. The attached

1 site diagram disclosed the dimensions and location of the fill but not
2 its volume, composition or elevation. The City requested and obtained
3 a survey showing the elevation of the fill.

4 2. State Environmental Policy Act, chapter 43.21C RCW. The City
5 has not adopted rules for integrating SEPA into its procedures. The
6 proposed declaration of non-significance was not circulated by the
7 City. The City's Shoreline Management Administrator was not expressly
8 appointed as the responsible official under SEPA.

9 3. Appearance of Fairness. The SEPA checklist upon which the
10 declaration of non-significance (DNS) was based had been changed after
11 filing and before issuance of the proposed final DNS. Counsel for
12 Bowe directed a biased letter to the City's Shoreline Management
13 Administrator. This letter was placed in the public file and was
14 commented on by respondent Grace Lundstad in her letter to the City
15 (Ex. A-21). The City filed the approved shoreline substantial
16 development permit with the State Department of Ecology and Attorney
17 General but did so without copies of letters it received opposing the
18 proposal and with copies of letters it received favoring the proposal.

19 V

20 Any Conclusion of Law which should be deemed a Finding of Fact is
21 hereby adopted as such.

22 From these Findings, the Board comes to these

23 CONCLUSIONS OF LAW

24 I

25 We must review the proposed development (the Bowe home and

1 landfill) for consistency with the applicable master program and the
2 provisions of the Shoreline Management Act (Act). RCW 90.58.140. The
3 applicable master program is the Westport Shoreline Master Program
4 (WSMP), adopted February 27, 1973, and approved by letter of the
5 Department of Ecology dated November 7, 1974.

6 II

7 Section 5 of the Ordinances of the WSMP adopts a shoreline
8 designation map. The notes to the map state:

9 Westport: This city will soon submit a separate map
10 showing the designations more clearly. Generally,
11 however, the beach is as described above. The boat
12 basin and area to the east is all Urban to the mean
13 high tide line, and Conservancy out in the water
14 until reaching the extension of Pacific Street.
15 Thereafter everything covered by extreme high tide is
16 Conservancy, and the remaining area of jurisdiction
17 is Urban. (Emphasis added.)

18 As will be seen, the Urban environment is more conducive to
19 development than the Conservancy environment. Significantly, the WSMP
20 does not place the landward boundary of Conservancy at the line of
21 extreme high tide (the earthen dike upon which appellants reside).
22 Rather, it places it out into the marsh at the line of mean high
23 tide.¹ The site in question, the Bowe property, is within the Urban
24 environment.

25 III

26 Landfill is a permitted use in the Urban environment, WSMP Section
27

- 28 1. Note that beyond the extension of Pacific Street (in the Harbor)
29 the Conservancy environment does extend to extreme high tide.

1 16.00(2), p. ORD-18. Landfill shall not be permitted in a Conservancy
2 environment. WSMP Section 10.2, p. ORD-13.

3 IV

4 Landfill is permitted subject to the WSMP policies and
5 regulations. WSMP Section 16.00(2), p. ORD-18. Two policies favor
6 development in presently developed areas:

7 3. (e) Development in presently developed areas
8 should be encouraged in order to utilize existing
improvements. Residential policy, p.12 WSMP.

9 1. (d) Urban environment designation of presently
10 undeveloped land should give priority to proximity to
existing high intensity development and avoid areas
11 of critical environmental importance. Urban
Environment, p.22 WSMP.

12 The location of the Bowe property at the foot of a developed city
13 street with close proximity to neighbors both along and across the
14 street meets the WSMP policy favoring landfill development in
15 presently developed areas.

16 V

17 Another WSMP policy states:

18 Marshes: Marshes should not be drained, filled
19 (wholly or partly), should not be bordered or
20 bisected by utility or transportation corridors,
21 should not be dredged, and dams and tidegates should
22 not be installed. All of these activities will
23 seriously effect the marsh ecology. Where no
24 alternative is available the smallest marshes should
25 be sacrificed and structures or activities should
26 violate the integrity of the marsh as little as
27 possible. (Emphasis added.) P.19 WSMP.

The record does not disclose either another means for building on the
site, other than through use of landfill, nor another homesite owned

1 by Bowe. We conclude that "no alternative is available" within the
2 meaning of the marsh-filling policy of the WSMP quoted. Structures or
3 activities therefore must violate the integrity of the marsh as little
4 as possible. The loss of marsh area from fill, confined to portions
5 of one-half of the 200' x 200' site, violates the integrity of the
6 marsh as little as possible. The loss of marsh is minimized by
7 locating the post-Act fill, in part, over pre-Act fill.

8 VI

9 Regarding the contents of Bowe's application for a substantial
10 development permit, appellants cite the Department of Ecology rule,
11 WAC 173-14-110 on the contents for such an application. Pertinent to
12 this case the rule provides:

13 (5) Where appropriate, proposed land contours
14 using five-foot intervals in water area and ten-foot
15 intervals on areas landward of ordinary high water
16 mark, if development involves grading, cutting,
17 filling or other alteration of land contours.

18 (8) Show source, composition and volume of fill
19 material.

20 The application contained a site diagram disclosing the dimensions and
21 location of the fill (Finding of Fact IV, above). This is sufficient
22 information from which to deduce its volume. The fill consists of
23 sand brought to the site. (Finding of Fact IV, above). We take
24 official notice of Exhibit A-25 offered by appellants and admitted in
25 our prior case, SHB No. 81-10, which is a site inspection report of
26 the Corps of Engineers establishing the composition as sand. This
27 document was available to all parties to this case prior to the permit

1 approval which we now review. The information in Bowe's application
2 is in substantial compliance with the requirements of WAC 173-14-110
3 quoted above.

4 Moreover, the application and corresponding substantial
5 development permit contain sufficient detail to enable the City and
6 this Board to determine consistency with the preferred uses and
7 policies set forth in the WSMP and Shorelines Management Act so far as
8 landfill is concerned. This is the standard of Hayes v. Yount, 87
9 Wash. 2d 280, 552 P.2d 1038 (1976). Under the same standard, there is
10 insufficient detail in the application and substantial development
11 permit, literally no detail or site plan, which would allow this Board
12 to determine consistency of the proposed residence with the WSMP and
13 Act. Consequently, the provision of the substantial development
14 permit allowing Bowe to "Build home" should be stricken.

15 VII

16 Respondent Bowe proposes to construct a single-family dwelling for
17 his own use. On condition that this residence does not exceed a
18 height of 35 feet above average grade level and that it meets all
19 requirements of state or local governments having jurisdiction
20 thereof, the residence is not a "substantial development." RCW
21 90.58.030(e)(vi). As such, it does not require a substantial
22 development permit under RCW 90.58.140(2). If, however, the residence
23 is exempt from the definition of substantial development but is
24 subject to a U. S. Corps of Engineers permit, the City must prepare a
25 "letter of exemption" WAC 173-14-115. At minimum, the City must know

1 the "average grade level," defined at WAC 173-14-030(6), in order to
2 render its determination of whether 1) a letter of exemption or 2) a
3 further substantial development permit or 3) neither is appropriate.

4 A single-family residence, whether or not exempt from the
5 definition of "substantial development" is nonetheless a "development"
6 and must be consistent with the WSMP and Shoreline Management Act.
7 WSMP Section 4.00(3)(c), p. ORD-3 and Section 5.00 (first paragraph)
8 p. ORD-4. See also RCW 90.58.030(3)(d) and RCW 90.58.140(1). The
9 City should have on public record detailed plans of Bowe's proposed
10 residence sufficient to determine consistency with the WSMP and the
11 Act. These should be used by the City to determine whether a letter
12 of exemption is appropriate and whether the residence is consistent
13 with the WSMP and the Act. If the City determines that a letter of
14 exemption is not appropriate and that a substantial development permit
15 is required for the residence, plans for the residence must be
16 incorporated into a substantial development permit application meeting
17 the requirements of WAC 173-14-110.

18 VIII

19 This record does not disclose any City rules for the integration
20 of SEPA, chapter 43.21C RCW, policies and procedures into the various
21 programs under its jurisdiction as required by RCW 43.21C.120 and WAC
22 197-10-800. If the City has failed to adopt such rules, the SEPA
23 guidelines (chapter 197-10 WAC) shall be applied as best as
24 practicable to the actions of the City, WAC 197-10-900(2).

25 The SEPA guidelines provide that a threshold determination shall

1 be made by the "responsible official" designated by the lead agency
2 (City). WAC 197-10-300. In the absence of City SEPA regulations or
3 other evidence to the contrary, we conclude that the City's
4 designation of a Shoreline Management Administrator also serves as
5 implied designation that the same person act as SEPA responsible
6 official on shoreline applications. The Shoreline Management
7 Administrator thus was the correct person to render the threshold
8 determination in this case and, in fact, did so.

9 The SEPA guidelines also provide that a proposed negative
10 declaration will be prepared and sent to other agencies with
11 jurisdiction in certain circumstances. WAC 197-10-340(3) and (4).
12 Appellants have not proven any of the circumstances requiring such
13 sending of a proposed negative declaration. One of these
14 circumstances occurs where there is another agency with jurisdiction.
15 WAC 197-10-340(3)(a). While the environmental checklist cites the
16 U. S. Corps of Engineers as an additional source of approval required
17 for the project, "agency with jurisdiction" is defined by the SEPA
18 guidelines as "an agency", WAC 197-10-040(4), which is further defined
19 to exclude any federal agency, WAC 197-10-040(5). The preparation and
20 issuance of a proposed negative declaration has not been proven
21 necessary in this case and failure to send or circulate such a
22 proposed negative declaration did not render the City's compliance
23 with SEPA defective.

24 IX

25 The appropriate test under the appearance of fairness doctrine,

1 which appellants invoke, is whether a:

2 "disinterested person, having been apprised of the
3 totality of a board member's personal interest in a
4 matter being acted upon, would be reasonably
5 justified in thinking that partiality may exist?

6 Swift v. Island County, 87 Wash. 2d 348, 552 P.2d 175 (1976). Hill v.
7 Department of Labor and Industries, 90 Wash. 2d 276, 580 P.2d 636
8 (1978).

9 The decision maker in this case, the City's Shoreline Management
10 Administrator, was not shown to have a personal interest in the matter
11 being acted upon. We conclude that the changes to the environmental
12 checklist, the receipt of the letter from Bowe's attorney and the
13 exclusion of opposition letters in the City's filing with DOE (Finding
14 of Fact IV, above) do not rise to a violation of the appearance of
15 fairness doctrine and that this substantial development permit is not
16 defective due to any violation of the doctrine.

17 X

18 In summary, the fill placed on his property by Bowe and the 30
19 yards which he proposes to add are consistent with the WSMP and
20 Shoreline Management Act.² The application and permit contain

21 2. Our jurisdiction is limited to review of the granting, denying or
22 rescinding of a permit on shorelines of the state. RCW
23 90.58.180. The subject permit only refers to "fill placed on
24 property by applicant" (Bowe). We have no permit to review
25 regarding the two fills, placed by Bowe's predecessors. For the
26 guidance of the parties, however, the evidence submitted about
27 these two prior fills suggests that the totality of fill on the
28 Bowe's site when this permit application was made is consistent
29 with the WSMP and the Act.

1 insufficient information concerning the proposed residence to
2 determine consistency with the WSMP and Act. Appellants have not
3 proven any defect in compliance with SEPA procedure nor a violation of
4 the appearance of fairness doctrine.

5 XI

6 We have considered the other contentions of appellants and find
7 them to be without merit.

8 XII

9 Any Finding of Fact which should be deemed a Conclusion of Law is
10 hereby adopted as such.

11 From these Conclusions, the Board enters this
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ORDER

The shoreline substantial development permit issued by the City of Westport to Kenneth Bowe is affirmed excepting authority to "Build home" which is reversed and shall be stricken.

DONE at Lacey, Washington, this 9th day of June, 1982.

SHORELINES HEARINGS BOARD

Nat W. Washington
NAT W. WASHINGTON, Chairman

Gayle Rothrock
GAYLE ROTHROCK, Vice Chairman

Richard A. O'Neal
RICHARD A. O'NEAL, Member

Ronald Holtcamp
RONALD HOLTCAMP, Member

William A. Harrison
WILLIAM A. HARRISON,
Administrative Law Judge